NO. 87-1352

IN THE

Supreme Court Of The United States

October Term, 1988

BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS, AND THE CHANCELLOR OF THE UNIVERSITY OF ARKANSAS AT PINE BLUFF *Petitioners*

v.

SYLVESTER LEGRAND AND HENRY RAYFUS *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. In an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, and 42 U.S.C. §1981, an inference or presumption of discrimination arises when the plaintiff establishes a prima facie case. Is the inference of discrimination ongoing, even after the defendant has introduced a legitimate non-discriminatory reason for the employment decision and the trial court has all the evidence before it to make a decision on the ultimate question of discrimination? The Circuit Courts of Appeals are in conflict as to this question.

2. Did the Court of Appeals for the Eighth Circuit improperly conduct what amounted to a de novo weighing of the evidence in this case, in disregard of the District Court's findings of credibility of the witnesses and contrary to Federal Rule of Civil Procedure 52 and this Court's opinion in *Anderson v. City of Bessemer,* 470 U.S. 564 (1985)?

LIST OF PARTIES

The parties to the proceedings below were the respondents and the Trustees of the University of Arkansas at Pine Bluff; Bradley D. Jesson; Jacqueline Douglas; Robert D. Pugh; Hugh B. Chalmers; Jack L. Williams; Hall McAdams, III; Kaneaster Hodges, Jr.; Gus Blass, II; M. A. Jackson; W. Sykes Harris, Sr.; and Dr. Lloyd V. Hackley, Chancellor. Except for Chancellor Hackley, all of the persons named as defendants below were members of the Board of Trustees of the University of Arkansas. None of the defendants were sued in their individual capacities.

There are no separate "Trustees of the University of Arkansas at Pine Bluff." Since institution of the suit, Bradley D. Jesson, Jacqueline Douglas, Robert D. Pugh and Hugh B. Chalmers have completed their terms on the Board of Trustees of the University of Arkansas. The term of Jack L. Williams will soon expire. Dr. Lloyd V. Hackley has resigned as the Chancellor of the University of Arkansas at Pine Bluff, and has been replaced.

Pursuant to Rule 40.3 of the Rules of the Supreme Court, the Board of Trustees of the University of Arkansas has been substituted for "Trustees of the University of Arkansas at Pine Bluff," and members of the Board of Trustees have not been named. Pursuant to Rule 40.4, the names of the Trustees and the Chancellor have been omitted.

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NO. ____

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**PETITION FOR WRIT OF CERTIORARI
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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, the Board of Trustees of the University of Arkansas and the Chancellor of the University of Arkansas at Pine Bluff, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on June 16, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 821 F.2d 478, and is reprinted in the Appendix, page 1, *infra*. The Order denying Petitioner's Petition for Rehearing and Rehearing en banc is reprinted in the Appendix, page 16, *infra*.

The Judgment of the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, and the Findings of Fact and Conclusions of Law in accordance therewith, have not been reported. It is reprinted in the Appendix, page 17, *infra*.

JURISDICTION

The respondents brought this suit in the Eastern District of Arkansas, Pine Bluff Division, invoking federal jurisdiction under 42 U.S.C. §§1981 and 1983, and the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.*, and under 28 U.S.C. 1343(3)(4), 2201 and 2202. The case was tried to the Court on February 21 and 22, 1986. On May 28, 1986, the Court found in favor of the petitioners and dismissed respondents' complaint. See Appendix, p. 17, *infra.*

Respondents appealed, and on June 16, 1987, the Eighth Circuit remanded the case to the District Court with directions to enter judgment for the respondents and against petitioners. See Appendix, p. 1, *infra.* A timely petition for rehearing and rehearing en banc was denied on November 12, 1987, with four judges voting to grant. See Appendix, p. 16, *infra.*

The jurisdiction of the Supreme Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C.§1981 provides in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.*, provides in pertinent part:

§2000e-2. Discrimination because of race, color, religion, sex, or national origin.

(a) Employers. It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual . . . because of such individual's race. . . .

STATEMENT OF THE CASE

The University of Arkansas is a five-campus, state-supported institution of higher education established by Arkansas law. The ultimate policy-making authority for the University resides in the Board of Trustees, composed of nine whites and one black.

The University of Arkansas at Pine Bluff (UAPB) is an historically black institution of higher education which was merged into the University of Arkansas in 1972. The official majority race, and the overwhelming majority of students, faculty, administrators and employees at UAPB are black (Negro). Non-blacks are officially classified as minority races. (TR 292, 343-344). In December of 1982, all of the employees at the Physical Plant were black. (TR 184, 213).

The predominant race at the other four campuses of the University of Arkansas is white. For many years, the State of Arkansas has been under a mandate to correct the racial imbalance in its

statewide system of higher education, of which the University of Arkansas is a part. *Adams v. Richardson,* 480 F.2d 1159, 1164-1165 (D.C. Cir. 1973).

No one who testified at trial was aware of any pressure from the Board of Trustees, the central administration of the University or anyone else to hire whites at UAPB. Nor was any witness aware of a general trend at UAPB to replace blacks with whites when a vacancy opened up. (TR 57, 63, 211, 213, 346, 348). None of the Trustees named as defendants nor Chancellor Hackley was involved in the employment decisions at issue.

In fiscal year 1982-1983, the Electrical Department of the Physical Plant at UAPB was composed of three black men, electrical supervisor Willie Pree, Respondent Sylvester Legrand, and Respondent Henry Rayfus. Pree had worked for UAPB for thirty-five (35) years, and had been in the electrical department since 1957. (TR 13). Legrand was hired as an electrician in 1975. (TR 99). Rayfus was hired in 1974. (TR 140). Both were classified as journeyman electricians, although Rayfus was a master electrician at the time his contract was not renewed. (TR 55). They were hired on annual employment contracts which had been renewed each year until 1983. They both understood that there was no guarantee that their annual contracts would be

renewed. (TR 127, 157).

Until December 31, 1982, James Bankston, a black person, had been Director of the Physical Plant. James Collins, a black person, was Acting Director of the Physical Plant from January 1 until February 28, 1983. On March 1, 1983, Burton Henderson, a white person was hired as Director of the Physical Plant, and Vernon Cornish, a black person, was hired as Director of Engineering Services, the second position of authority at the Physical Plant. (TR 178, 302-303, 307-308). Bankston did not think race had anything to do with his removal and replacement by Henderson. (TR 76-77).

The Director of Physical Plant reported to Benson Otovo, who had been Vice Chancellor for Fiscal Affairs and Administrative Services since 1979. He and Chancellor Lloyd V. Hackley were black persons. (TR 291, 319).

Inadequate funding for anticipated needs for fiscal year 1983-84 forced a reduction in the number of positions at UAPB. Thirty (30) staff or non-faculty positions and six (6) faculty positions were cut across the campus. Nineteen (19) positions were eliminated at the Physical Plant, including one of the two journeyman electrician positions occupied by respondents. Forty-two (42) contracts were not renewed across the campus. Twenty-seven (27)

contracts were not renewed in the Physical Plant, including those of respondents. (TR 40-42, 167-168, 179, 296-301, 318).

In December of 1982, as part of the budget process, Otovo asked James Collins to look over the operation of the Physical Plant, and determine whether some positions could be surrendered without sacrificing services. In January 1983, Collins recommended that eighteen contracts, including those of respondents, not be renewed. (TR 207-210, 299). Legrand and Rayfus consistently took all their sick leave available whether they were sick or not (TR 35-36, 124-126) and often took time off or did not show up for work without notifying anyone in authority and without authorization, contrary to the policies at UAPB. (TR 271-272). Collins felt that because their rate of absenteeism was so high, their positions could be surrendered without sacrificing services. (TR 208).

Collins and Otovo discussed the recommendations with Henderson and Cornish, after they were hired in March. Henderson had the authority to change any of the recommendations made by Collins. (TR 207-210, 301-303). Pree was not consulted about the decision not to renew respondents' contracts. He testified that he probably would have renewed their contracts. (TR 25-26).

Respondents were not terminated for cause. The letters of non-renewal did not give a reason for the non-renewal. When they appealed their non-renewals, they were told the reason was a reduction in force. (TR 142, 146-147).

The District Court found the testimony of respondents not to be credible. Appendix, p. 23, *infra*. At trial, Legrand testified that compensatory time could be taken "whenever he got ready," and that all that was necessary was to call the secretary and tell her. (TR 109-110). He also testified that all sick leave was to be taken regardless of whether one was sick. (TR 125). The testimony of other witnesses from UAPB was that sick leave was only to be taken when sick, and vacation time and compensatory time were to be requested and approved in advance. (TR 178, 229, 239-240, 255-256, 342).

Legrand and Rayfus both testified they had never been disciplined or talked to about their leave practices. (TR 118, 154). Bankston and Pree testified that unauthorized absences in 1980 and 1981 had resulted in time being docked from both Legrand's and Rayfus' pay, and that both supervisors had talked to Legrand and Rayfus about their abuse of leave time. (TR 39, 80-81, 259-269, 276, 279)

In 1981, Pree rated respondents average on dependability and attendance-punctuality. In the

1982 evaluations, Pree noted that the respondents were occasionally late, frequently absent but for cause, and that they always notified on time. However, the problem of abuse of leave time continued off and on. (TR 32, 38-39, 272, 279-287).

The consistent pattern of unauthorized absences and abuse of sick leave reduced the productivity of Legrand and Rayfus to the level where it was felt that neither could have performed the duties of the single journeyman electrician after the cut-back. If either of the respondents had been productive enough to meet Vice Chancellor Otovo's standards, he would have interviewed them both, and determined whom to retain. (TR 306-307).

After respondents stopped working, Pree asked Henderson's permission to look for a replacement. Race was not mentioned in the discussion. Pree told Bankston, who was teaching vocational arts, that he needed some help. Bankston recommended one of his students, Michael Cummings, to Pree, but did not mention that Cummings was white. Pree talked to Cummings, and confirmed that he was an experienced electrician, although Pree did not know whether he was a certified journeyman electrician. Pree then took him to talk to Henderson. Cummings applied for the journeyman electrician position on July 5, 1983, and was hired on July 15, 1983, as extra help, part-time. His work was good, and on August

25, 1983, Henderson recommended to Vice Chancellor Otovo that Cummings be hired permanently. (TR 22, 27-28, 44-49, 55, 79-80, 325-328).

When Pree retired in August of 1984, he recommended that Michael Cummings be promoted to electrical foreman. His recommendation was accepted. (TR 49, 329-330). Cummings had taken very little sick leave, he would always be on the job and stayed there till the end of the day. Pree never had complaints about Cummings not completing work assigned to him. (TR 36-37, 40). Cummings was capable of doing everything he was assigned, even sophisticated work of the type done by a master electrician. (TR 55-56).

In 1984, the General Assembly appropriated more funds for the University, and a number of the positions cut in 1983 were restored. Nineteen employees had been hired in the Physical Plant, twelve blacks and seven whites. At the date of trial, there were 106 employees in the Physical Plant, six (6) whites and one hundred (100) blacks. (TR 338-339, 341). By 1986, there were two full-time journeyman electricians, both of whom were black. (TR 309). Otovo testified that he would not have authorized hiring anyone whose contract had not been renewed because of non-productivity, including either of the respondents, for any vacancy at UAPB. (TR 306-307).

Legrand testified that he was qualified for electronics, electrical work, instrument testing, and air conditioning and refrigeration. (TR 104). There was no evidence that positions in any of these areas, except for electrical work, were among those filled.

At the time of trial, Vernon Cornish had been replaced as Director of Engineering Services by James Kilts, who is white. (TR 338) Since the spring of 1983, in addition to hiring Henderson, Cornish, and Kilts, Vice Chancellor Otovo had hired a black to replace the white Controller, and promoted the black Director of Financial Aid. (TR 349-350).

After a two day bench trial, the District Court found that Legrand and Rayfus had failed to establish a prima facie case of racial discrimination, that UAPB had presented a legitimate non-discriminatory reason for discharging respondents, and that the reason articulated by UAPB for not renewing their employment was not pretextual. The District Court reached the ultimate issue of discriminatory intent by finding that "race played no role in the decision to terminate plaintiffs' contracts or the decision not to rehire the plaintiffs." Appendix, p. 24, *infra*.

On appeal, the Court of Appeals for the Eighth Circuit reversed, finding that the overall circum-

stances dictated that a prima facie "inference of discrimination based upon race" had been established which was "ongoing" and affected the weight given to the evidence. *Legrand v. Trustees*, 821 F.2d 478, 481 (8th Cir. 1987).

The Eighth Circuit also reversed the finding of no pretext, based on its conclusion that Michael Cummings was inexperienced, without seniority, and white, and neither of respondents was considered for any of the positions which were later restored. *Id.* at 483.

Petitioners petitioned the Eighth Circuit for rehearing and rehearing en banc, urging that the case should have been remanded to the District Court for consideration of the proper weight to be accorded a prima facie case. Petitioners also urged that the appellate panel had misapplied the clearly erroneous rule of Federal Rule of Civil Procedure 52 and this Court's ruling in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). The petition was denied, by a vote of 5-4.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's ruling that establishment of a prima facie case creates an "ongoing" inference of discrimination conflicts with decisions of this Court and other Circuits.

The three stages of the order of presentation of proof in a Title VII case were set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805 (1973) and reiterated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-256 (1981). In the first stage, the plaintiff must establish a prima facie case, which "in effect creates a presumption that the employer unlawfully discriminated against the employee." *Id.* at 254. The burden of production then shifts to the defendant/employer to "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.* "A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." *Id.*, n. 10. However, the evidence which established the prima facie case and inferences

properly drawn therefrom "may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Id.* (Emphasis added).

This Court has ruled that the effect of a complete trial, in which all the evidence is introduced by both sides, is to make the matter of the prima facie case and its inferences of discrimination irrelevant. "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.' *Burdine, supra* at 253." *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

The District Court ruled on each of the McDonnell Douglas/Burdine elements and reached the ultimate question of whether petitioners intentionally discriminated against respondents. On appeal, respondents urged that the District Court erred in failing to find a prima facie case of racial discrimination. Petitioners argued that under this Court's ruling in *Aikens*, and *Ansonia Board of Education v. Philbrook*, ___ U.S. ___, 107 S.Ct. 367, 371, 93 L.Ed.2d 305 (1986), whether respondents made out a prima facie case was irrelevant since the District Court found there was no unlawful

discrimination. *Legrand v. Trustees of UAPB*, *supra* at 481.

The Eighth Circuit rejected this argument, stating that:

> to accept this proposition is to ignore the allocations of burdens set out by the Supreme Court in *McDonnell Douglas* and to disregard the inference of discriminatory intent to which these plaintiffs are entitled. When a district court erroneously fails to recognize a prima facie case under Title VII, a reviewing court cannot be certain whether this legal error colored the factual findings favoring the defendant. Failure to recognize a prima facie case when one has been established detracts from the proper weight the trier of fact must afford to the plaintiffs' evidence and the **ongoing inference of discrimination properly drawn from it.**

Id. (Emphasis added). The Eighth Circuit referred to footnote 1 of its decision in *Wells v. Gotfredson Motor Co., Inc.*, 709 F.2d 493, 496 (1983), in which it was stated: "When the defendant produces evidence of a legitimate, nondiscriminatory reason for its actions, that mandatory presumption drops from the case but the **logical inference of discrimination** arising **from the prima facie evidence remains.**"

(Emphasis added).

The Third Circuit distinguishes between the mandatory presumption/inference of discrimination created by the prima facie case, and a permissible inference of discrimination from the evidence submitted by the plaintiff, but allows an inference of discrimination to remain after the defendant's rebuttal: "When the defendant produced evidence of a nondiscriminatory reason, the **presumption** [of discrimination] dropped from the case. A permissible **inference** of discrimination remained, however, to create an issue of fact." *Bhaya v. Westinghouse Electric Corp.*, 45 FEP Cases 212, 216 (3rd Circuit 1987). (Emphasis supplied).

The Eighth and Third Circuits appear to distinguish between an "inference" and a "presumption" of discrimination, which are used interchangeably by this Court. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). (The prima facie case "raises an **inference** of discrimination"); *Burdine, supra* at 254, ("Establishment of the prima facie case in effect creates a **presumption** that the employer unlawfully discriminated against the employee."). (Emphasis added). If, as these two circuits appear to reason, upon the employer's rebuttal of the prima facie case, the "presumption" drops from the case but the "inference" of discrimination is ongoing, the burden has effectively

been shifted to the employer to disprove the inference. This is contrary to placement of the ultimate burden on the plaintiff to prove intentional discrimination, (see *Burdine, supra,* at 256), and contrary to the positions of other courts of appeals, which hold that the presumption/inference of discrimination is destroyed by the defendant's rebuttal evidence. "If the defendant carries the burden of articulating a legitimate, nondiscriminatory reason for his actions, the presumption of discrimination 'drops from the case,' *Burdine* at 255 n. 10, and plaintiff's burden of rebutting defendant's proffered reason 'merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.' *Id.* at 256." *White v. Vathally,* 732 F.2d 1037, 1040 (1st Cir. 1984). "The plaintiff's evidence that sufficed to invoke the presumption, however, remains in the case, although unaided by the presumption. . . . " *Monroe v. Burlington Industries, Inc.,* 784 F.2d 568, 572 (4th Cir. 1986). "Even if Mauter established a prima facie case, the defendant's solid evidence of a legitimate, non-discriminatory reason for their actions completely rebuts the inference of discrimination raised by the plaintiff's initial showing." *Mauter v. Hardy Corp.,* 45 FEP Cases 116 (11th Cir. 1987).

The Sixth and Eleventh Circuits accept the *Aikens* and *Philbrook* positions that once the prima face case has been rebutted, the ultimate question of

discrimination is before the court, and whether the prima facie case was made out is irrelevant.

If the defendant successfully articulates a legitimate reason, however, the presumption of discrimination imposed by *McDonnell Douglas* disappears. *See U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715 (1983). At this stage, a Title VII trial is procedurally indistinguishable from any other civil trial. The shifting burdens have run their course, and the trial court must now turn its attention to the ultimate question of fact: Did the defendant intentionally discriminate against the plaintiff? At this last stage, sufficiency of the parties' proof as to the intermediate *McDonnell Douglas* burdens is no longer an issue. *Aikens,* 460 U.S. at 713-14.

Tye v. Board of Education of Polaris Joint Vocational School District, 811 F.2d 315, 318 (6th Cir. 1987); See also *Mauter v. Hardy Corp.*, 45 FEP Cases 116 (11th Cir. 1987).

The Seventh Circuit is in accord. "Once the trial in a disparate treatment case is over, the question is whether the employer intentionally discriminated against the employee on account of race or another characteristic covered by the statute. The employee bears the burden on this subject, and the rules

governing prima facie cases, order of proof, responses, and so on no longer matter." *Pollard v. Rea Magnet Wire Company, Inc.*, 824 F.2d 557, 558 (7th Cir. 1987); *Benzies v. Illinois Department of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir. 1987).

"In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine, supra*, at 255, n. 8. The method of analysis suggested in *McDonnell Douglas* "was never intended to be rigid, mechanized, or ritualistic." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The formulation of the Eighth and Third Circuits makes it exactly that-rigid, mechanized and formal. This Court should grant certiorari in order to once again clarify the burdens and presumptions/inferences which arise from establishment of a prima facie case, and state the effect, if any, of an erroneous failure by a District Court to recognize a prima facie case when it reaches the ultimate issue of discrimination after hearing all of the evidence.

II.

The Eighth Circuit improperly conducted what amounted to a de novo weighing of the evidence in disregard of the District Court's findings of credibility of the witnesses and contrary to Federal Rule of Civil Procedure 52 and decisions of this Court.

In a discrimination action, an appellate court may not set aside a district court's findings of no discriminatory intent unless clearly erroneous. Findings based on determinations of credibility of witnesses can virtually never be clear error. Federal Rule of Civil Procedure 52; *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). When reviewing factual findings under the clearly erroneous standard, an appellate court may not review the evidence *de novo* or substitute its judgment of the facts for that of the district court.

In this case, the District Court found that:

race played no role in the decision to terminate plaintiffs' contracts or the decision not to rehire the plaintiffs. Evidence supports the fact that budget cut-backs resulted in plaintiffs' terminations. Plaintiffs' consistent pattern of unauthorized absences and their abuse of sick leave reduced their productivity to

the level where neither could have performed the duties expected of a single journeyman electrician after the cut-back.

Appendix, p. 24, *infra*. The Eighth Circuit reversed this finding. "Because the evidence of pretext is so strong, we conclude that the district court's finding of no discriminatory intent is clearly erroneous and leaves us with 'a firm conviction that a mistake has been made. ' " *Legrand v. Trustees of UAPB*, 821 F.2d 478, 482 (1987).

The trial court heard testimony and received evidence during two days of trial. Both respondents and their spouses testified, as did numerous faculty, staff and administrators from UAPB. The District Court made extensive findings, which were supported by documentary evidence and the testimony of respondents. Some of the factual findings were misstated by the Eighth Circuit, then refuted, ignoring the evidence in the record which supported the District Court's actual findings. The District Court made specific findings that the respondents lacked credibility, yet the Eighth Circuit chose to believe respondents' version of disputed testimony over the testimony presented by UAPB.

The Eighth Circuit does not dispute the finding of the District Court that "plaintiffs consistently

took all the sick leave available to them, whether they were sick or not" or that "both plaintiffs missed work without prior authorization or notification at times." Instead, the appellate court focuses on respondents' taking comp time. The District Court made no finding that taking comp time was a factor in respondents' non-renewal. They were entitled to compensatory time-and-a-half for overtime, just as they were entitled to vacation time. The District Court's findings concerned the manner in which respondents took their leave time.

The Eighth Circuit explained away respondents' excessive and unauthorized absences by quoting their testimony that "they understood they were entitled to a fixed number of sick days per year, whether they were sick or not," and that "their understanding of the procedures regarding compensation time and sick leave formed the basis for their actions." *Id.* This finding ignores the District Court's finding that "the testimony of plaintiffs is not credible." Their testimony concerning the use of sick leave, comp time and vacation differed from the testimony of other UAPB employees. The District Court found their testimony to be "replete with inconsistencies," which is amply substantiated by the record. The Eighth Circuit did not have the opportunity to observe the respondents' demeanor in the courtroom. The District Court found that "their demeanor on the stand did nothing to enhance their

credibility."

The Eighth Circuit misstated the findings of the District Court. The District Court found that "plaintiffs were considered undependable because of their excessive absences." The Eighth Circuit stated that the District Court found "plaintiffs were not retained because they were undependable," *Legrand v. Trustees of UAPB, supra,* then sought to refute the "finding" by citing job evaluations prepared in March of 1981 and 1982. The evaluations are not inconsistent with the District Court's finding. The 1981 evaluations gave respondents "average" ratings for attendance-punctuality. The 1982 evaluations reflect the respondents were "occasionally late" and "frequently absent—but for cause."

The Eighth Circuit asserts that there was a "paucity of evidence of inadequate performance" and that the record contains "minimal evidence of disciplinary action taken against" respondents. *Id.* This finding ignores the letter of reprimand given to Legrand in 1980 for taking time off without authorization and the deduction of four hours from his salary. It ignores reports of unauthorized absences of both respondents made by Willie Pree to Physical Plant Director James Bankston in 1980 and 1981, and that Rayfus was required to work overtime to make up the lost time. It ignores the testimony of Bankston and Pree that they discussed the problem

of missed work time with both respondents. (TR 80-81, 272, 277, 279).

The Eighth Circuit also misstated the District Court's findings on the factors considered in non-renewal of respondents' contracts. The Eighth Circuit correctly states the finding of reduced productivity due to excessive absences, then states that "the court emphasized, however, that 'quality of work, tardiness and insubordination' also contributed to UAPB's decision.' *Id.* The District Court found that "twenty-seven contracts were not renewed at the Physical Plant for fiscal year 1983-84, including plaintiffs' contracts . . . The primary factor considered in determining whether to renew contracts was productivity, although Mr. Otovo stated that the quality of work, tardiness, and insubordination were also factors considered." Appendix, p. 21, *infra*. Quality of work, tardiness and insubordination were factors considered in the determination of which contracts not to renew across campus. The factors which led to non-renewal of respondents' contracts were the "consistent pattern of unauthorized absences and their abuse of sick leave" which "reduced their productivity to the level where neither could have performed the duties expected of a single journeyman electrician."

The Eighth Circuit concluded that pretext was shown because an inexperienced white person was

selected for the remaining journeyman electrician position, and respondents were not offered any of the other nineteen positions which were eventually filled. The District Court found that respondents were not offered the single position for the samne reason they were non-renewed—they were not considered to be qualified because of their excessive absences. There was no evidence that respondents were qualified for any of the other positions which were eventually filled.

The Eighth Circuit seems to find some evidence of an intent to replace blacks with whites from the slight change in racial composition of the Physical Plant between 1983 and 1986. Before 1983, there were no whites in the Physical Plant. In 1986, there were six whites and one hundred blacks. This is scant statistical evidence of pretext.

The Eighth Circuit appears to believe that the reason for not renewing respondents' contract was concocted by UAPB officials after this suit was instituted, because respondents were initially told that budgetreductions forced cutbacks in staff. There is no rule of law which requires the employer of a contract employee to renew the contract, even after the employee's contract has been repeatedly renewed. Nor is an employer required to give a reason for not renewing a contract. By giving budget reduction as the reason for non-renewal, UAPB insured that

respondents were eligible for unemployment compensation. Additionally, if abuse of leave time had been given as a reason for termination, it could be considered as a "stigmatizing" reason for dismissal, entitling respondents to a "name clearing hearing." *Carey v. Piphus,* 435 U.S. 247 (1978).

The Eighth Circuit states that "if UAPB officials considered either plaintiff a poor performer or otherwise undependable, they had ample opportunity to discharge him." *Legrand v. Trustees of UAPB, supra* at 482. Yet when economic circumstances created a situation in which non-renewal was justified, the Eighth Circuit finds the reason to be a pretext for discrimination. There is an inherent inconsistency in that position.

The Eighth Circuit violated the principle of Rule 52 that the District Court, not an appellate court, is to make findings of fact. Instead, the appellate court asserted clear error and substituted its own contrary findings, disregarding the credibility findings of the District Court. Certiorari should be granted in order to review the application of the clearly erroneous doctrine by the Court of Appeals for the Eighth Circuit.

CONCLUSION

This petition for a writ of certiorari should be granted to clarify whether the inference of discrimination created by establishment of a prima facie case is destroyed completely by introduction of a legitimate, non-discriminatory reason for the employment action, or whether the inference is "on-going" in some manner, and to determine whether the Eighth Circuit violated the clearly erroneous rule in this case.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 86-1789

Submitted Jan. 13, 1987.
Decided June 16, 1987.

Sylvester Legrand and Henry Rayfus, Appellants
v.
Trustees of University of Arkansas at Pine Bluff; Bradley D. Jesson; Jacqueline Douglas; Robert D. Pugh; Hugh B. Chalmers; Jack L. Williams; Hall McAdams, III; Keneaster Hodges, Jr.; Gus Blass, II; M. A. Jackson; W. Sykes Harris, Sr.; and Dr. Lloyd V. Hackley, Chancellor, Appellees

Before LAY, Chief Judge, HEANEY, Circuit Judge, and CAHILL,* District Judge.

LAY, Chief Judge.

Sylvester Legrand and Henry Rayfus appeal the dismissal of their claims against the University of Arkansas at Pine Bluff (UAPB) alleging employment

*The HONORABLE CLYDE S. CAHILL, United States District Judge for the Eastern District of Missouri, sitting by designation.

discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-17, and 42 U.S.C. §1981. The district court[1] found that the plaintiffs had not made a prima facie case of discrimination and the defendant had established legitimate, non-discriminatory reasons both for discharging the plaintiffs and for failing to rehire them when positions became available. The plaintiffs challenge these conclusions. We reverse and remand for further proceedings.

Facts

Legrand and Rayfus are black, certified journeymen electricians who were employed in the electrical department of the Physical Plant at UAPB. Legrand had been with UAPB since 1975 and Rayfus since 1974. The university employed both men on a contractual basis. Both testified at trial that they knew their contracts were subject to renewal every year. The only other employee in the electrical department was their supervisor Willie Pree, who is also black. Pree was responsible for work schedules of Legrand and Rayfus, and he had prepared their employee evaluations for several years.

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[1]The Honorable Elsijane T. Roy, United States District Court for the Eastern District of Arkansas, presiding.

Vice Chancellor Benson Otovo testified that in 1983, UAPB instituted budget cutbacks. Nineteen positions in the Physical Plant were eliminated, including one of the two journeyman electrician positions. On July 1, 1983, twenty-seven contracts in the Physical Plant, including the plaintiffs', were not renewed for fiscal 1983-84. After their contracts were not renewed, Legrand and Rayfus applied for any parttime or fulltime position at UAPB. Nineteen positions eventually were filled in the Physical Plant after the plaintiffs' contracts were not renewed.[2] Blacks filled twelve of the positions, and whites filled seven; neither plaintiff was interviewed or offered any of these jobs.

On July 5, 1983, Michael Cummings, a white male, applied for the journeyman electrician position, and he was hired on a temporary basis on July 15. On August 25, 1983, Burton Henderson, who is white and who had served as director of the Physical Plant since March 1983, recommended Cummings for permanent appointment to the journeyman electrician position. Cummings eventually became supervisor of the electrical department when Pree retired.

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[2]The record does not establish the dates in 1983 when recruiting and hiring for the nineteen positions began and ended. The evidence indicates that most of the jobs were filled after July 1, 1983.

The plaintiffs filed suit against UAPB, alleging discrimination in the nonrenewal of their contracts and in the failure of UAPB to consider or hire them for jobs for which they applied and were qualified. UAPB contends that the decision to terminate the plaintiffs was based on budget cutbacks and the need to employ only the best qualified, most productive workers.

Discussion

Under traditional guidelines, a plaintiff establishes a prima facie case of racial discrimination in a Title VII and §1981 discharge action by showing that: (1) he belongs to a racial minority; (2) he was qualified for the job and satisfied its normal requirements; (3) he was discharged; and (4) after his discharge, the employer assigned a non-minority employee to perform the same work. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The district court concluded that white is the minority race at UAPB and black is the dominant race because UAPB is classified as a traditionally black campus of the university and the overwhelming majority of employees in the Physical Plant is black. The court also found that the plaintiffs were unqualified for the job because they were not dependable. On these bases, the court held that the plaintiffs had failed to

establish a prima facie case. We find the failure of the trial court to recognize a prima facie case to be legal error.

The proof required to establish a prima facie case of discrimination will necessarily vary in different fact situations. The operative inquiry is whether the plaintiff has produced sufficient evidence to create an inference—that is, a rebuttable presumption—that an employment-related decision was based on an illegal racial criterion under the Act. *See McDonnell Douglas Corp. v. Green,* 411 U.S. at 802 n. 13, 93 S.Ct. at 824 n. 13.

Title VII prohibits employment discrimination against "any individual" because of the individual's race.[3] Its terms are not limited to discrimination against members of any particular race. *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 278-79, 96 S.Ct. 2574, 2577-78, 49 L.Ed.2d 493 (1976). Instead, the Act proscribes "[d]iscriminatory preference

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[3]42 U.S.C. §2000e-2(a)(1). The Act provides in pertinent part:

(a) *Employers.* It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

for **any** [racial] group, **minority** or **majority**. *Id.* at 279, 96 S.Ct. at 2578 n. 6 the Court noted that the racial minority requirement of *McDonnell Douglas* "was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination." *Cf. Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir. 1982) (prima facie case of racial discrimination in discharge may be established even if plaintiff is replaced by individual of his own race). Thus, we think it clear that it is not an essential element to the establishment of a prima facie case that a plaintiff prove he is within a minority group. Each case must withstand an independent analysis. The overall circumstances may dictate, as they do here, that a prima face inference of discrimination based upon race has been established. *Cf. Leichihman v. Pickwick Int'l.*, 814 F.2d 1263, 1269 (8th Cir. 1987) (prima facie case in age discrimination action turns on particular facts that create an inference of discrimination).

UAPB is not an autonomous institution; it is but one campus in a multiple-campus system of the University of Arkansas (UA). The overwhelming majority of students and employees at UA is white. The board of trustees, which has ultimate policymaking authority at UA, consists of nine whites and one

black.

The plaintiffs' immediate supervisor Willie Pree and the acting director of the Physical Plant at the time of the decision to discharge plaintiffs, James Collins, are both black. Benson Otovo, the Vice Chancellor for Fiscal Affairs and Administrative Services, is also black. On Collins' recommendation, Otovo determined in January, 1983, not to renew the plaintiffs' contracts. Burton Henderson, who is white, became permanent director of-the Physical Plant in March, 1983. In the years that the plaintiffs had worked for UAPB, there had never been a white director of the Physical Plant. Collins testified that although the recommendation to lay off plaintiffs had been made before March of 1983, Henderson retained the final authority to decide which positions would be eliminated. Henderson reviewed the recommended cuts and approved the nonrenewal of plaintiffs' contracts. Henderson also made the decision to hire Cummings for the remaining journeyman electrician position.

The district court also found that the plaintiffs were not qualified for the job because they were "unreliable," an assessment that turned largely on subjective evidence produced by the defendant. Even if we assume that this finding is valid, it should not affect the district court's evaluation at the prima facie stage of whether the plaintiffs have established

that they are qualified for the job.[4] For purposes of establishing a prima facie case, the plaintiffs need only show their objective qualifications for the job. *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1344-45 (9th Cir. 1981) (for prima facie case, plaintiff need only prove objective job qualifications; subjective judgments of relative qualifications should be established by employer at step two), *cert. denied*, 459 U.S. 823, 103 S.Ct. 53, 74 L.Ed.2d 59 (1982); *Davis v. Califano*, 613 F.2d 957, 964 (D.C. Cir. 1979) (court should consider only minimum objective qualifications to establish prima facie case). Here, the plaintiffs proved by a preponderance of the evidence that they were experienced, journeymen electricians, and UAPB does not dispute this. They also adduced evidence through employee evaluations that they satisfied the normal requirements of the job prior to their dismissal. This is all that is required at the prima facie stage. We conclude that there is sufficient evidence to establish a prima facie case of racial discrimination under Title VII.

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[4]A determination of an employee's reliability necessarily involves subjectivity. One UAPB employee evaluation form lists traits such as "dependability," "cooperation," and "responsibility." A supervisor fills in the appropriate level of performance, from zero (lowest) to four (highest). Another UAPB form includes as performance criteria "integrity," "dependability," and "attitude." In the aggregate, these traits may help to

The defendant urges that whether the plaintiffs made out a prima facie case is irrelevant since the district court reached the ultimate issue and found that there was no unlawful discrimination. *See United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 714, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983). To accept this proposition is to ignore the allocation of burdens set out by the Supreme Court in *McDonnell Douglas* and to disregard the inference of discriminatory intent to which these plaintiffs are entitled. When a district court erroneously fails to recognize a prima facie case under Title VII, a reviewing court cannot be certain whether this legal error colored the factual findings favoring the defendant. Failure to recognize a prima facie case when one has been established detracts from the proper weight the trier of fact must afford to the plaintiffs' evidence and the ongoing inference of discrimination properly drawn from it. *Cf. Wells v. Gotfredson Motor Co., Inc.*, 709 F.2d 493, 496 n. 1 (8th Cir. 1983). In this case, the trial court's failure to recognize the plaintiffs' prima facie case left the court to consider only the defendant's evidence of what it

measure one's reliability, but the subjective judgments that come into play are undeniable. Evidence of an employer's subjective intent and pretext, if any, is raised at the second and third stages of proof in a Title VII case; evidence of one's objective qualifications is all that is required at the prima facie stage.

claimed were the nondiscriminatory reasons for discharging the plaintiffs. There is little doubt why the defendant was successful.

Ordinarily when this occurs, we would remand the case to the trial court for reevaluation, with proper weight being given to the inference of discriminatory intent established by the plaintiffs' prima facie case. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). In this case, however, there exists more than an error of law. Because the evidence of pretext is so strong, we conclude that the district court's finding of no discriminatory intent is clearly erroneous and leaves us with "a firm conviction that a mistake has been made." *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

The district court found that the plaintiffs were not retained after many years' employment at UAPB because they were undependable. The plaintiffs' job evaluations, however, reveal the contrary. For example, in his 1982 evaluation, Rayfus measured, on a scale of zero (lowest) to four (highest), two's in dependability and initiative, three's in responsibility and punctuality, and four's in attitude and work capacity. In his 1981 evaluation, Rayfus received average, above average, or superior ratings in all categories. In Legrand's 1982 evaluation, he received

a two in dependability, three's in initiative, responsibility, and punctuality, and a four in interest and enthusiasm. In his 1981 evaluation, Legrand also received average, above average, or superior ratings in all categories.

The court also found that budget restrictions caused UAPB's decision to terminate the plaintiffs' contracts and that "a consistent pattern of unauthorized absences and their abuse of sick leave reduced [plaintiffs'] productivity to the level where neither could have performed the duties expected of a single journeyman electrician after the cut-back." The court emphasized, however, that "quality of work, tardiness, and insubordination" also contributed to UAPB's decision. The plaintiffs testified that they were originally told that budget reductions forced the nonrenewal of their contracts.[5] It was only after they instituted this action that they were told poor performance brought about the discharge as well as the refusal to reemploy them. We agree with the

[5]In the letters of May 3, 1983, notifying Legrand and Rayfus of the nonrenewals, they were given no reason for UAPB's action. After they challenged the nonrenewals, they were told that budget reductions forced cutbacks in staff.

plaintiffs that based upon the overall record, such an assertion is not credible.[6]

The plaintiffs also testified that they often worked overtime and at school events in the evening and they were compensated for this with time off rather than overtime pay. They further testified that they understood they were entitled to a fixed number of sick days per year, whether they were sick or not.[7] The plaintiffs' understanding of the procedures regarding compensation time and sick leave formed the basis of their actions. Legrand and Rayfus had been taking comp time and sick days for many years,

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[6]The Defendant's Answers to Plaintiffs' First Interrogatories do not cite work deficiency as the reason for nonrenewal of the contracts. When asked to state the reason for terminating Legrand and Rayfus, the defendant responded in Answer No. 2:

> Plaintiffs were appointed to their positions on an annual basis, which expired at the end of each fiscal year. Budget cut-backs for fiscal year 1983-84 forced a reduction in the number of positions at the Physical Plant. As a result, Plaintiffs were not offered a contract for fiscal year 1983-84.

When asked to state the reasons for not rehiring either plaintiff, presumably referring to other positions for which plaintiffs applied, the defendant referred to Answer No. 2.

[7]There is inconsistent evidence in the record regarding the sick leave policy at UAPB. Evidently at one timne, supervisors in the Physical Plant had some discretion in administering sick leave.

yet the record contains minimal evidence of any disciplinary action taken against them because of this. Employment records spanning many years provide a more objective picture of the plaintiffs' work history at UAPB than the defendant's post hoc, conclusory justifications for the discharge and failure to rehire. If UAPB officials considered either plaintiff a poor performer or otherwise undependable, they had ample opportunity to discharge him. The failure to do so and the paucity of evidence of inadequate performance strongly suggest that considerations other than performance and dependability came into play.

After the plaintiffs were discharged, neither was given the opportunity to apply for the remaining journeyman electrician position that eventually went to Michael Cummings. Testimony of UAPB officials establishes that the position was not advertised, and the selection of Cummings was made outside any objective recruiting or hiring procedures. Pree and Bankston both testified that they considered either plaintiff capable of doing the job. Pree testified that there was nothing in their work records that would have caused him not to recommend them. Neither plaintiff was given any reason for UAPB's refusal to consider him for the remaining journeyman position or any of the other nineteen positions eventually filled.

Plaintiffs also argue that because the UAPB campus is predominantly black, the school was interested in attracting white students and employees and in replacing black employees with white employees. The defendant concedes that UAPB is subject to the directives of *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), requiring certain state-operated higher education institutions that receive federal funds under Title VII to end segregation. Before 1983, there were no whites in the Physical Plant. At the time of trial in 1986, there were six whites and one hundred blacks in the Physical Plant. Despite this change, UAPB officials testified that there had been no significant alteration in racial composition at UAPB for many years. UAPB complains that it is faced with the Hobson's choice of maintaining the current racial imbalance and risking noncompliance with *Adams v. Richardson* or altering the imbalance by hiring whites to replace blacks and risking Title VII suits such as this. Whether the defendant was motivated by a federal court edict to replace black workers with whites, particularly in the Physical Plant, is not at issue here. This is a disparate treatment case. The issue is whether the plaintiffs were denied employment because of racial considerations. UAPB did not posture its defense in terms of justifiable affirmative action. If it had, many other considerations would have come into play and a totally different record, controlled by distinct legal principles, would be under

review in this appeal.

We find that the overwhelming evidence shows that the defendant's reasons for failing to renew plaintiffs' contracts or rehire them when the opportunity arose were pretextual. Even assuming that budget cutbacks caused the nonrenewal of some contracts, the record shows that only one journeyman electrician job was eliminated. The person selected for the remaining position was inexperienced, without seniority, and white. This and the complete failure to consider the plaintiffs for job vacancies created shortly after the cutback lead to one conclusion: the plaintiffs were rejected because of their race.

The cause is remanded to the district court with directions to enter judgment for the plaintiffs and against the defendant and to hold an evidentiary hearing on damages and whatever other equitable relief the court finds appropriate to make the plaintiffs whole.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1789EA

Sylvester Legrand et al.,
Appellants,
vs.
Trustees of University of
Arkansas at Pine Bluff, et al,
Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas.

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Judges John Gibson, Fagg, Bowman and Magill voted to grant.

Petition for rehearing by the panel is also denied.

November 12, 1987
Order entered at the Direction of the Court:
/s/ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Sylvester Legrand, Henry Rayfus,
Plaintiffs
vs. No. PB-C-84-449
Trustees of University of Arkansas
at Pine Bluff, et al,
Defendants

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered this same date, the Court hereby finds in favor of the defendants and dismisses the plaintiffs' complaint.

ENTERED this 28th day of May, 1986.

/s/ELSIJANE T. ROY,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Sylvester Legrand, Henry Rayfus,
Plaintiffs
vs. No. PB-C-84-449
Trustees of University of Arkansas
at Pine Bluff, et al,
Defendants

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff Sylvester Legrand is a black American male, who, at all times relevant to this cause of action, has resided in Pine Bluff, Jefferson County, Arkansas.

2. Plaintiff Henry Rayfus is a black American male, who, at all times relevant to this cause of action, has resided in Pine Bluff, Jefferson County, Arkansas.

3. The defendants, Bradley D. Jesson, Jacqueline Douglas, Robert O. Pugh, Hugh B. Chalmers, Jack L. Williams, Hall McAdams, III, Kaneaster

Hodges, Jr., Gus Blass, II, M. A. Jackson, and W. Sykes Harris, Sr., were trustees of the University of Arkansas system at the time the original complaint was filed in this matter; and Dr. Lloyd V. Hackley was Chancellor of the University of Arkansas at Pine Bluff campus.

4. The University of Arkansas at Pine Bluff is a branch of the University of Arkansas system, which is a legal subdivision of the State of Arkansas, and which operates and maintains itself as an employer within the meaning of 42 U.S.C. §2000e *et seq.*

5. The University of Arkansas at Pine Bluff is an historically black institution of higher education.

6. The predominant race at the University of Arkansas at Pine Bluff is black. Whites are officially classified as a minority race at the University of Arkansas at Pine Bluff.

7. James Bankston, a black person, was Supervisor of the Physical Plant until December 21, 1982. James Collins, a black person, was appointed Acting Supervisor from January 1, 1983, through February 28, 1983. Burton Henderson, a white person, was hired as Physical Plant Supervisor effective March 1, 1983.

8. The Electrical Department of the Physical

Plant consisted of the electrical supervisor, Willie Pree, and two journeyman electricians positions, both held by plaintiffs, for fiscal year 1982-83, and prior years. All three were black.

9. Plaintiff Henry Rayfus was hired by the University of Arkansas at Pine Bluff as an electrician in January, 1974, and was certified as a journeyman electrician while employed at UAPB. He was employed on annual contracts and understood that his contract term beginning on July 1, 1982, ended June 30, 1983. Mr. Rayfus understood that there was no guarantee of renewal of his contract. Mr. Rayfus' contract was not renewed on July 1, 1983.

10. Plaintiff Sylvester Legrand was hired as an electrician by UAPB on April 11, 1975, and was certified as a journeyman electrician while employed at UAPB. He too was employed on annual contracts and understood that there was no guarantee of renewal of his contract each year. Mr. Legrand's contract was not renewed on July 1, 1983.

11. Budget cutbacks for fiscal year 1983-84 forced a reduction in the number of positions at UAPB. Mr. Benson Otovo, Vice Chancellor for Fiscal Affairs, stated that UAPB had to maintain quality professors and had certain fixed expenditures. He was of the opinion that faculty positions needed to be kept and therefore, they decided to look at the

support staff to determine where cuts could be made. They determined the amount of expenditures of the departments and looked at what areas were essential to running the University. Thirty positions were cut throughout the campus, including 19 positions at the Physical Plant. One of the journeyman electrician positions was among those cut. Forty-two contracts were not renewed.

12. Twenty-seven contracts were not renewed at the Physical Plant for fiscal year 1983-84, including plaintiffs' contracts.

13. The decision as to which positions to cut in the Physical Plant was made by James Collins, Acting Director of the Physical Plant, after consultation with Benson Otovo, Vice Chancellor for Fiscal Affairs, prior to the date Burton Henderson became Director of the Physical Plant.

14. The primary factor considered in determining whether to renew contracts was productivity, although Mr. Otovo stated that the quality of work, tardiness, and insubordination were also factors considered.

15. Both plaintiffs consistently took all the sick leave available to them, whether they were sick or not. The UAPB sick leave policy was that a person was only to use sick leave if he was sick.

16. Both plaintiffs missed work without prior authorization or notification at times.

17. In the fall of 1982, both plaintiffs took a trip to Little Rock and submitted reimbursement forms for lunch and dinner. Ronald Watley, the UAPB business manager, reviewed the receipts and concluded that the numbered tickets appeared too close together to represent lunch and dinner. After speaking with Mr. Otoba, Watley gave the plaintiffs a choice. He would proceed to process the receipts and after investigating, if it was determined the receipts were incorrect, he would seek prosecution, or plaintiffs could withdraw the forms. Plaintiffs chose to withdraw the forms.

18. Although the evaluations written by Mr. Pree indicate good work done by plaintiffs, Valeria Jordan, secretary of the Physical Plant, testified that in the spring of 1983, there was an evaluation sheet and letter of both plaintiffs written by Mr. Pree that turned up missing. She never discovered how they were missing, but stated that the files are located in a file cabinet in the hallway about fifteen feet from the electrical shop. They were warning letters according to Ms. Jordan.

19. Mr. Pree sometimes received complaints about work not getting done that had been assigned

to plaintiffs. Similar complaints were not received about Mr. Cummings.

20. James Bankston, former director of the Physical Plant, had to discuss missing days with plaintiffs.

21. Willie Pree wrote a letter to Mr. Legrand in 1980 concerning his leaving work without permission. Four hours of pay was deducted from his salary as a result of one particular absence.

22. Plaintiffs were considered undependable because of their excessive absences, and thus not qualified to fill the single journeyman electrician position for fiscal year 1983-84.

23. The Court finds the testimony of plaintiffs is not credible. Their testimony was replete with inconsistencies and their demeanor on the stand did nothing to enhance their credibility.

24. After plaintiffs' contracts were not renewed, Mr. Pree felt short-handed. Mr. Henderson agreed to give him some help. No mention of race was made. Mr. Pree could not find anyone for awhile. He then spoke with Mr. Bankston, who said he had a young man in his class who was an electrician. He was not identified as white or black. Mr. Pree spoke with the gentleman named Michael Cummings (white) and

asked him if he could rearrange his classes. Mr. Pree then made a formal request to hire Mr. Cummings. Mr. Cummings began working on a part-time basis, and when Mr. Pree retired, he recommended Cummings be hired as the electrical supervisor.

25. The evidence and testimony presented leads the Court to conclude that race played no role in the decision to terminate plaintiffs' contracts or the decision not to rehire the plaintiffs. Evidence supports the fact that budget cut-backs resulted in plaintiffs' termination. Plaintiffs' consistent pattern of unauthorized absences and their abuse of sick leave reduced their productivity to the level where neither could have performed the duties expected of a single journeyman electrician after the cut-back.

26. None of the individually named defendants had personal responsibility for the non-renewal of plaintiffs' contracts or for the hiring of Michael Cummings.

Conclusions of Law

1. In order to prevail on claims of discrimination under Title VII, plaintiffs bear the ultimate burden of persuading the trier of fact that the defendants initially discriminated against them. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711,

715 (1983); *Davis v. Lambert of Arkansas, Inc.*, 781 F.2d 658, 660 (8th Cir. 1986); *O'Connor v. Peru State College*, 781 F.2d 632, 636 (8th Cir. 1986).

2. Plaintiffs have the initial burden of establishing a prima facie case, that is, of establishing facts sufficient to give rise to an inference that their non-reappointment was motivated by discrimination. The burden then shifts to the employer, who must articulate an alternate legitimate reason for the discharge sufficient to dispel the unfavorable inference. The burden then shifts back to plaintiffs to show that the reason articulated by the employer was pretextual and that the employer was actually improperly motivated. *O'Connor v. Peru State College, supra.*

3. In order to establish a prima facie case in a discharge action, Plaintiffs must show:

(1) That they belong to a racial minority.

(2) That they were qualified for the job that they were performing and satisfied the normal requirements in their work;

(3) That they were discharged; and

(4) That after their discharge, the employer assigned non-minority employees to perform the

same work.

Person v. J. S. Alberici Construction Co., Inc., 640 F.2d 916, 919 (8th Cir. 1981).

4. The dominant race at UAPB is black (Negro), the same race as the plaintiffs. Out of 95 employees in the Physical Plant, only two or three were white. Vice Chancellor Benson Otovo testified that whites are officially classified as the minority race at UAPB.

5. Testimony presented indicates that neither of the plaintiffs was qualified for the remaining journeyman electrician position because they could not be depended upon to be at work regularly.

6. The budget cutbacks for fiscal year 1983-84 made it imperative that the work force at the Physical Plant be efficient. Plaintiffs' consistent abuse of sick leave, and their practice of taking off whenever they wanted without prior permission made them unreliable and inefficient.

7. Plaintiffs were treated with great tolerance during their employment, and no evidence was presented that they were unfairly treated which could provide a basis for allegations of racial discrimination. It is clear that the reason articulated by the officials at UAPB for not renewing plaintiffs' employment was not pretextual.

8. Plaintiffs have failed to establish a prima facie case of racial discrimination. Furthermore, defendants presented a legitimate non-discriminatory reason for discharging plaintiffs.

9. Because of the Court's holding, it is not necessary to address the Eleventh Amendment and immunity claims asserted by the defendants.

10. The plaintiffs' complaint should be dismissed based upon the foregoing Findings of Fact and Conclusions of Law.

ENTERED this 28th day of May, 1986.

/s/ELSIJANE T. ROY
United States District Judge

No. 87-1352

In The
Supreme Court of the United States
October Term, 1987

—o—

BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS, AND THE CHANCELLOR OF THE UNIVERSITY OF ARKANSAS AT PINE BLUFF,

Petitioners,

vs.

SYLVESTER LEGRAND and HENRY RAYFUS,

Respondents.

—o—

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

—o—

BRIEF IN OPPOSITION

—o—

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In The
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October Term, 1987

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BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS, AND THE CHANCELLOR OF THE UNIVERSITY OF ARKANSAS AT PINE BLUFF,

Petitioners,

vs.

SYLVESTER LEGRAND and HENRY RAYFUS,

Respondents.

—o—

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

—o—

BRIEF IN OPPOSITION

—o—

STATEMENT OF THE CASE

This case presents two questions already decided by this Court: (a) whether a court of appeals has properly

exercised its powers when reviewing a district court's decision based on incorrect legal principles and clearly erroneous findings of fact and (b) whether the court of appeals correctly held that plaintiffs had established a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Legrand and Rayfus, respondents herein, are black, certified journeyman electricians who were employed on a contractual basis in the electrical department of the Physical Plant at the University of Arkansas at Pine Bluff ("UAPB"). Legrand had worked with UAPB since 1975 and Rayfus since 1974. Both testified at trial that they knew their contracts were subject to renewal every year. The only other employee in the electrical department was their supervisor, Willie Pree, who is also black. As their immediate supervisor, Pree had prepared evaluations of the two for several years.

UAPB's Vice Chancellor Benson Otovo testified that in 1983 the school instituted budget cutbacks. As a result, UAPB slated nineteen positions in the Physical Plant, including one of the two journeyman electrician positions, for elimination. On July 1, 1983,[1] twenty-seven employees who worked in the Physical Plant, including Legrand and Rayfus, learned that their contracts were not being renewed for the fiscal year of 1983-84.

UAPB has asserted various reasons for the nonrenewal of respondents' contracts and their refusal to con-

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[1]The Director of the Physical Plant at this time was Burton Henderson, a white male, who had held that position since March 1, 1983.

sider the respondents for the remaining journeyman electrician position or any other position at the school.[2] Originally, UAPB cited budget cuts as the reason for both nonrenewal and their refusal to rehire. Appendix (App.) at 12, n.6. Only after respondents brought this action did UAPB inform Legrand and Rayfus that "poor performance brought about the discharge as well as the refusal to reemploy them." App. at 11. On appeal to the Eighth Circuit, UAPB raised a third explanation—the risk of noncompliance with the desegregation directives of *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). The record, however, belies UAPB's assertion that neither respondents were qualified for "the duties of the single journeyman electrician after the cut-back." Pet. Br. at 10.

Despite UAPB's assertion that respondents were unqualified, the record shows that they were veteran, certified electricians. Job evaluations indicate that both Legrand and Rayfus were given scores ranging from average to superior in dependability, responsibility, initiative and work capacity. App. at 10-11. Pree and James Bankston, the Director of the Physical Plant prior to the cutbacks, testified that either respondent was qualified to fill the remaining electrician opening. Pree also testified that he knew of nothing in either respondents' employment files to cause him not to recommend them. Id. at 13. Further, the record contains "minimal evidence" of disciplinary actions against respondents for their allegedly unauthorized absences. Id. at 13.

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[2]It is unclear why the trial court solicited evidence of a "legitimate nondiscriminatory reason for discharging plaintiffs" from UAPB if, as the trial court held, respondents had failed to establish a prima facie case. App. at 27.

On July 5, 1983, only four days after respondents were laid off, Michael Cummings, a white male, applied for the open journeyman electrician position, and he was hired on a temporary, part-time basis on July 15. At the time, Cummings was a student of James Bankston who recommended Cummings to Pree. On August 25, 1983, Burton Henderson recommended that Cummings be hired permanently. Cummings eventually became supervisor of the electrical department when Pree retired. Neither respondent was informed of, nor considered for, the opening filled by Cummings.[3]

In 1984, the General Assembly of the State of Arkansas appropriated more funds to UAPB. The nineteen positions cut in 1983, including the journeyman electrician job, in the Physical Plant were eventually restaffed. Neither Legrand nor Rayfus was interviewed for these openings.

Legrand and Rayfus brought suit against UAPB in the Eastern District of Arkansas alleging racially disparate treatment in the nonrenewal of their contracts and in the failure to consider them for subsequent openings for which they applied and were qualified.

In its Findings of Fact and Conclusions of Law (App. at 18-27), the District Court dismissed respondents' complaint. The trial court found as fact that "[t]he evidence and testimony presented leads the Court to conclude that *race played no role* in the decision to terminate the plain-

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[3]UAPB officials testified that the selection of Cummings "was made outside any objective recruiting or hiring procedures." App. at 13.

tiffs' contracts or the decision not to rehire the plaintiffs." App. at 24. The trial court held that respondents had failed to establish a prima facie disparate treatment case because (a) black is the "dominant race" at UAPB and (b) neither respondent was qualified for the remaining electrician job. App. 26-27. Respondents appealed and the Eighth Circuit, applying the decisions of this Court, reversed.

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SUMMARY OF ARGUMENT

The questions presented challenge the Eighth Circuit's reversal of the trial court's flawed legal conclusions and clearly erroneous findings of fact. The petition should be denied because it presents no conflict of decisions among the circuits and presents no conflict with the decisions of this Court. Petitioner concedes that the Eighth Circuit's opinion raises no important or new issues of law and instead requests that review be granted so this Court can "*once again clarify*" the allocations of proof in a Title VII disparate treatment case and to correct errors by the court of appeals. There is no need for such clarification and the Eighth Circuit correctly applied well-established principles from this Court's decisions in *McDonnell Douglas*, and *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), to the trial court's mistaken legal analysis and clearly erroneous fact finding.

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ARGUMENT

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISION IN ANDERSON V. CITY OF BESSEMER

Petitioner asks this Court to review whether or not the Eighth Circuit paid "lip service" only to the clearly erroneous rule. Petitioner does not claim that the court of appeals was unaware of *Anderson* and *Pullman-Standard v. Swint*. App. at 10. The court of appeals acted well within its sphere and refrained from substituting its judgment as to disputed facts. Rather, petitioner's argument rests upon speculation concerning the possibility that the rule might have been avoided or erroneously applied. Neither assertion is supported by the record.

Petitioner concedes that the trial court erred in failing to find that respondents established a prima facie case. Petitioner's attempt to minimize the impact of such legal error on the trial court's fact finding is futile. As the Eighth Circuit stated:

> When a district court erroneously fails to recognize a prima facie case under Title VII, a reviewing court cannot be certain whether this legal error colored the factual findings favoring the defendant. . . . In this case, the trial court's failure to recognize the plaintiffs' prima facie case left the court to consider only the defendant's evidence of what it claimed were the nondiscriminatory reasons for discharging the plaintiffs.

App. at 9 (cite omitted).

Petitioner makes much of the trial court's finding that respondents' testimony lacked credibility. Pet. Br.

at 22. A factual finding based on demeanor is not immune from appellate review. *Anderson*, 470 U.S. at 575 ("the trial judge may [not] insulate his findings from review by denominating them credibility determinations"). Where, as here, a court of appeals has documentary evidence, other testimony and finds inconsistencies in defendant's story, it "may well find clear error even in a finding purportedly based on a credibility determination." Id. at 575.

In light of these considerations, *Anderson* was properly applied. Petitioner's disagreement with the Eighth Circuit's finding in favor of respondents does not warrant review by this Court. *United States v. Johnston*, 268 U.S. 220, 227 (1925) "We do not grant a certiorari to review evidence and discuss specific facts."); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction [of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.")

II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT RESPONDENTS ESTABLISHED A PRIMA FACIE CASE AND THAT RULING IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

Holding that respondents established a prima facie disparate treatment case, the Eighth Circuit correctly applied *McDonnell Douglas* to the facts in this case. The

trial court's failure to find a prima facie case because respondents were unqualified[4] was reversible error.

The record simply does not support the trial court's finding that "neither of the plaintiffs was qualified for the remaining journeyman electrician position." App. at 26. Respondents were certified electricians and possessed years of experience. Further, respondents' direct supervisors, Pree and Bankston, testified that they were qualified for the remaining electrician position. Pree, who regularly evaluated respondents, also testified that nothing in the work records would have caused him to not recommend respondents for the position given to Cummings. Records indicate that both respondents received satisfactory evaluations.

The trial court ignored this substantial body of objective evidence that respondents were qualified in favor of "subjective evidence" that led the court to conclude that respondents were undependable. The court of appeals was correct in rejecting this evidence at the prima facie stage:

> For the purposes of establishing a prima facie case, the plaintiffs need only show their objective qualifications for the job. . . . Here, the plaintiffs proved by a preponderance of the evidence that they were experienced, journeyman electricians, and UAPB does not dispute this. . . . This is all that is required at the prima facie stage.

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[4]The trial court's legal conclusion that respondents failed to establish a prima facie disparate treatment case because they were not "minorities" at UAPB was also erroneous (App. at 26) and correctly reversed by the court of appeals. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-79 (1976).

App. at 8 (citing *Lynn v. Regents of University of California*, 656 F.2d 1337, 1344-45 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) and *Davis v. Califano*, 613 F.2d 957, 964 (D.C. Cir. 1979)).

In light of this evidence, the trial court erred when it failed to find that respondents had met their initial burden under *McDonnell Douglas*. The court of appeals' decision to reverse on this ground was correct and is consistent with the decisions of this Court and the decisions of the circuits. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 719 (1983) ("we cannot be certain that its findings of fact in favor of the Postal Service were not influenced by its mistaken view of the law."); *Pollard v. Rea Magnet Wire Company, Inc.*, 824 F.2d 557, 560 (7th Cir. 1987) (prima facie case found, but court of appeals reverses trial court's finding in favor of plaintiff as clearly erroneous).

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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